Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

RONALD B. PAUL,

Petitioner,

vs.

FARMLAND INDUSTRIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Appellate Procedure 39(e) incorporates all of Federal Appellate Rule 39, including the time limitations set forth in Federal Rule of Appellate Procedure 39(d)?

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OPINIONS BELOW

The Petitioner, Ronald P. Paul, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Eighth Circuit, which was entered in the above-titled proceeding on April 9, 1998.

The latest opinion of the United States Court of Appeals for the Eighth Circuit in this case was an unreported decision to deny a Petition for Rehearing and Suggestions for Rehearing En Banc. That opinion was issued on May 8, 1998, in *Ronald P. Paul v. Farmland Industries, Inc.*, and is reproduced in the Appendices to this Petition on App. 1.

The decision of the Eighth Circuit in this case was entered on April 9, 1998, and is unpublished. This decision is reproduced in the Appendices to this Petition beginning at App. 2.

BASIS FOR JURISDICTION

Petitioner, Ronald P. Paul, sought review of the Order entered by the District Court that required the Petitioner to pay certain costs of the appeal to the Respondent. The Eighth Circuit affirmed this Order on April 9, 1998, with an opinion dismissing Petitioner's argument that Federal Rule of Appellate Procedure 39(e) time barred the request for certain costs, and later denied the Petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc on May 8, 1998.

The statutory provision conferring jurisdiction on this Court to review the judgment by Writ of Certiorari is 28 U.S.C. § 1254(1).

FEDERAL RULE OF APPELLATE PROCEDURE INVOLVED

The Federal Rule of Appellate Procedure involved is Fed. R. App. P. 39, which states:

> (a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.
>
> (b) **Costs For and Against the United States.** In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.
>
> (c) **Costs of Briefs, Appendices, and Copies of Records.** By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of

records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) **Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later.** A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) **Costs on Appeal Taxable in the District Courts.** Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

STATEMENT OF THE CASE

Petitioner was employed by the Respondent, Farmland Industries, Inc., and as a result of actions taken by the Respondent, filed a three (3) count complaint alleging: age discrimination under the Age Discrimination in Employment Act (hereinafter "ADEA"), 29 U.S.C. § 621, *et seq.*; breach of an employment contract under Missouri common law; and fraud under Missouri common law.

This case was originally set for trial on November 17, 1991. After two mistrials and one postponement (at Respondent's request) the case was finally tried on its fourth trial setting on May 10, 1993. At the end of all of the evidence, the Court granted Respondent's Motion for Directed Verdict on Petitioner's claim for breach of contract. The next morning, immediately prior to the case being given to the jury for deliberation, the Court granted Respondent's Motion for Directed Verdict with respect to Petitioner's fraud claim. The jury was left to consider Petitioner's age discrimination claim. The jury found in favor of Respondent on Petitioner's age discrimination claim.

Petitioner thereafter filed a motion for a new trial on his three causes of action. On June 16, 1993, the Respondent submitted a Proposed Bill of Costs, to which the Petitioner submitted a Reply Objecting to any award of costs. By Order of September 27, 1993, the Court denied Petitioner's Motion as to all three counts. The Petitioner filed a Notice of Appeal on October 26, 1993. The United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court on November 7, 1994 and the Petitioner subsequently filed a Petition for Writ

of Certiorari with the United States Supreme Court, which was denied.[1]

On February 3, 1995, Respondent filed a Supplemental Proposed Bill of Costs. Petitioner filed an Objection to the Supplemental Proposed Bill of Costs on February 17, 1995. Over one (1) year later, March 3, 1996, an Order Settling Cost was issued and Petitioner motioned for a review of the Order. Over one (1) year later, on May 21, 1997, the Court issued an Order that granted in part and denied in part Petitioner's motion for review. Petitioner filed a Notice of Appeal on June 18, 1997.

Judgment was entered by the District Court in this case on May 21, 1993, and subsequent appeal proceedings followed. The Respondent filed its original Bill of Costs with the District Court on June 16, 1993. In February of 1994, the Respondent obtained a copy of the transcript of the District Court proceedings and the Petitioner and Respondent filed briefs in March and April of 1994. The appeal was argued before the Eighth Circuit Court of Appeals on May 9, 1994, and the decision of the Eighth Circuit was handed down on September 16, 1994.

On September 22, 1994, the Respondent filed its Bill of Costs with the Eighth Circuit seeking $147.00 for costs associated with the appeal. A Petition for Rehearing and Rehearing En Banc was filed and subsequently denied on October 26, 1994, by the Court of Appeals. On January 24, 1995, the Petitioner filed his Petition for Writ of Certiorari with the United States Supreme Court.

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[1] *See Paul v. Farmland Indus. Inc.*, 37 F.3d 1274 (8th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995).

The Clerk awarded Respondent $1,911.75 as costs of the transcript of appeal which Respondent requested in its Supplemental Bill of Costs dated February 2, 1995. Petitioner argued that Respondent should have been denied its request for the $1,911.75 due to its failure to comply with FED. R. APP. P. 39(d) and (e), as well as the extreme untimeliness of the request. At no time since the original filing of its Bill of Costs with the District Court did the Respondent attempt to file its Supplemental Bill of Costs for the fees of the court reporter for the transcript of the trial obtained for appeal. When the Respondent filed its Bill of Costs with the Eighth Circuit Court of Appeals, it knew of the costs associated with the transcript but failed to include the cost at that time. These costs had been paid seven (7) months prior to the filing of the Bill of Costs with the Court of Appeals.

The Respondent should have filed its Supplemental Bill of Costs for the cost of the transcript at the same time that it filed its Bill of Costs with the Court of Appeals in September of 1994. Instead, the Respondent waited for over five (5) months from the issuance of a decision by the Court of Appeals and until a petition for writ of certiorari was filed with the United States Supreme Court to attempt to request this cost without any relevant case law to support this decision.

Petitioner filed an Objection to the Supplemental Proposed Bill of Costs on February 17, 1995. Over a year later, on March 3, 1996, an Order Settling Cost was issued and Petitioner motioned for a Review of the Order. On May 21, 1997, well over a year after the previous Order, the Court issued an Order that granted in part and denied in part Petitioner's motion for review.

In its May 21, 1997, Order, the Federal District Court determined that Federal Rule of Appellate Procedure 39(e)'s taxable costs are not bound by the time limitations of FED. R. APP. P. 39(d). Not only did the District Court determine the meaning of the language in FED. R. APP. P. 39, it found that Respondent's request for the cost of the trial transcript was reasonable, even though well over a year had transpired since the expense was incurred.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), which affirmed the decision of the Federal District Court and determined that FED. R. APP. P. 39(e) is not subject to the time limits of FED. R. APP. P. 39(d). (App. at 3). The Petitioner filed a Petition for Rehearing and Suggestions for Rehearing En Banc, which was denied by the Eighth Circuit on May 8, 1998. (App. at 1).

The District Court had jurisdiction of this case pursuant to 29 U.S.C. § 621, *et seq.* and 28 U.S.C. §§ 1331 and 1343, as well as Fed. R. Civ. P. 18(a) and the pendent jurisdiction of the federal court. Plaintiff filed a Notice of Appeal on June 18, 1997. The United States Court of Appeals for the Eighth Circuit had jurisdiction of this case pursuant to FED. R. APP. P.4(a)(1).

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

A Writ of Certiorari should issue in this case to allow for the resolution of the conflict between the Federal Courts and the United States Supreme Court concerning the question of whether or not FED. R. APP. P. 39(e) fully

incorporates all of FED. R. APP. P. 39, including the fourteen (14) day time limit set forth in FED. R. APP. P. 39(d). Although the United States Supreme Court included a provision in FED. R. APP. P. 39(e) specifically incorporating all of Rule 39, the Federal Courts have misinterpreted this provision as being ambiguous and have imposed no reasonable time limit upon the submission of a bill of costs pursuant to Rule 39(e). Some of those Courts have held that it does not incorporate all of Rule 39, but only Rule 39(a).

This Court's intervention is necessary in the present case to guide the Federal Courts regarding the appropriate and reasonable time frame in which costs must be sought and assessed for an appeal. Without this Court's guidance, the lower Federal Courts will continue to conflict with the express intent of the United States Supreme Court and will allow parties in some District and Circuit Courts to be assessed costs, while allowing other parties to escape assessment despite similar fact patterns. Certainly, this is contrary to this Court's intent that FED. R. APP. P. 39(e) incorporate all of Rule 39, including the time limitation found in FED. R. APP. P. 39(d), when costs are to be assessed against a party.

II. THE FEDERAL COURTS ARE IN CONFLICT WITH THE UNITED STATES SUPREME COURT AND EACH OTHER AS TO WHETHER FEDERAL RULE OF APPELLATE PROCEDURE 39(e) INCORPORATES ALL OF RULE 39, INCLUDING THE TIME LIMITATIONS SET FORTH IN FEDERAL RULE OF APPELLATE PROCEDURE 39(d), WHEN ASSESSING COSTS.

The District and Circuit Courts are in conflict with the express intent of the United States Supreme Court

with their interpretation of Federal Appellate Rule 39. The determination of whether costs will be awarded to a prevailing party is left to the discretion of the district court. *See Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed. 2d 248 (1964). The general ability to tax costs is found in 28 U.S.C. § 1920, which states.

> [A] judge or clerk of any court of the United States may tax as costs the following:
>
> 1) Fees of the Clerk or Marshall;
>
> 2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> 3) Fees and disbursements for printing and witnesses;
>
> 4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> 5) Docket fees under section 1923 of this title;
>
> 6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

The Supreme Court, by adopting Federal Rule of Civil Procedure 54(d), attempted to set forth certain procedures and limitations regarding a District Court's ability to impose costs upon a losing party. However, neither 28 U.S.C. § 1920, nor Fed. R. Civ. P. 54, outline the standards necessary for taxing costs associated with the

appellate process. That was to be encompassed in Federal Rule of Appellate Procedure 39, in which the Supreme Court set forth the standards by which the Federal Courts may assess costs to the losing party. In setting forth the procedures for assessing costs on appeal in FED. R. APP. P. 39(e), the Supreme Court specifically set forth that costs were to be awarded in "favor of the party entitled to costs *under this rule.*"[2]

Unfortunately, the Federal Courts have focused on the wrong subsection of FED. R. APP. P. 39, subsection (d) instead of (e). In subsection (e), a plain reading of the text indicates that the subsection, although relating to costs which are to be taxed by the District Court, fully encompasses all provisions of Appellate Rule 39. As stated previously, subsection (e) states that "costs . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs *under this rule.*"[3] If the Federal Courts interpret subsection (e) as being separate or severed from the rest of FED. R. APP. P. 39, subsection (e) could never be the basis of taxing costs as it does not set forth the criteria of the party entitled to costs. It is the phrase "under this rule" which incorporates all of FED. R. APP. P. 39, including the necessity for a bill of costs and the time frame found in subsection (d), which establishes whether or not a party is procedurally entitled to costs.

In searching for other courts to follow, the Federal Courts have relied on "persuasive" authority based on a flawed reading of subsection (e) of FED. R. APP. P. 39, as

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[2] *See* Fed. R. App. P. 39(e) (emphasis added).

[3] *Id.*

well as other cases that are factually discernible.[4] The Federal Courts have relied heavily on *McDonald v. McCarthy*, 966 F.2d 112 (3d Cir. 1992), in fashioning an interpretation of FED. R. APP. P. 39, the meanings of its subsections, and whether or not the time limitation of subsection (d) pertains to subsection (e).

However, *McDonald* is a decision that was ultimately based not on a true reading of FED. R. APP. P. 39 as set forth by the Supreme Court, but on the Appellate Mandate which had ordered that each party bear its own cost. In *McDonald*, the Court's comment on the meaning of FED. R. APP. P. 39 was merely dicta, as it turned to the Appellate Mandate on Costs that it had previously decreed.

The other case which the Federal Courts heavily rely upon, *McKelvy v. Metal Container Corp.*, 125 F.R.D. 179 (M.D. Fla. 1989), also deals with issues not directly involving whether or not the language of FED. R. APP. P. 39(e) encompasses all of Rule 39. In *McKelvy*, the question of taxing costs under subsection (e) centered on whether or not the transcripts were necessary and whether bill of costs under subsection (e) had to be filed with both the court of appeals and the district court.

One of the cases that has determined that subsection (e) incorporates all of FED. R. APP. P. 39 and Fed. R. Civ. P. 54, is *Howard v. Group Hospital Service*, 618 F. Supp. 38, 39-40 (W.D.Okla. 1984). However, that decision found

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[4] *See Paul v. Farmland Indus. Inc.*, App. at 2 (citing *Soudouest Import Sales Corp. v. Union Carbide Corp.*, 102 F.R.D. 264 (D.P.R. 1984); and *Waterman S.S. Corp. v. Gay Cottons*, 419 F.2d 372 (9th Cir. 1969)).

that the bill of costs under subsection (e) must be submitted to the court of appeals, not to the district court.

The Supreme Court's express intent that FED. R. APP. P. 39(e) fully incorporate all of Rule 39, including the time limitations found in FED. R. APP. P. 39(d), is evident in the fact that all parties follow the procedures for creating a bill of cost outlined in subsection (d), regardless of the subsection under which the request is made. Rule 39(d) of the Federal Rules of Appellate Procedure clearly states that an "itemized and verified bill of costs" is to be filed with the clerk of the court within fourteen (14) days after the entry of the judgment. Rule 39(e) then specifies which court, the District Court, the Bill of Costs for the transcript should be filed. Since subsection (e) of FED. R. APP. P. 39 clearly incorporates all of Rule 39, the fourteen (14) day time limit found in FED. R. APP. P. 39(d) limits the available time in which a party may seek to have costs assessed under FED. R. APP. P. 39(e).

CONCLUSION

The Federal Courts have misread the plain text of Federal Rule of Appellate Procedure 39(e), authored by the United States Supreme Court for the taxing of the "cost of the reporter's transcript, if necessary for the determination of the appeal, . . . in the district court as costs of the appeal," FED. R. APP. P. 39(e). The Federal Courts' conflicting interpretation of FED. R. APP. P. 39(e) severs it from rule 39(d), which contains the procedures and time limits for the filing of the Bill of Costs. Those same Federal Courts state that subsection (d) clearly

refers to subsection (c), but refuse to follow the plain meaning of subsection (e) which incorporates all of Rule 39 through the statement, "under this rule." Denying that subsection (e) has incorporated the other subsections of FED. R. APP. P. 39 would leave it meaningless, without a procedural guide, and is contrary to the intent and plain language of the rule as promulgated by the United States Supreme Court.

Granting this Petition would allow this Court the opportunity to resolve the conflicting interpretations of FED. R. APP. P. 39 that distort the intent of the Court when it published the rule and guide the courts in assessing the costs of an appeal. To deny this Petition would allow the Federal Courts to continue misapprehending the true intent and plain meaning of FED. R. APP. P. 39 to the detriment of those who may have appellate costs assessed against them contrary to the explicit intent of the rule. Accordingly, for the reasons set forth herein, the Petitioners pray that this Court will grant this Petition for Writ of Certiorari, and ultimately reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submtted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2984

Ronald B. Paul, Appellant, v. Farmland Industries, Inc., Appellee.	* * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri. [UNPUBLISHED]

Submitted: April 6, 1998
Filed: April 9, 1998

Before FAGG, BEAM and HANSEN, Circuit Judges.

PER CURIAM.

Ronald B. Paul brought an unsuccessful employment action against Farmland Industries, Inc. (Farmland). Several months after this court affirmed the judgment, *see Paul v. Farmland Indus. Inc.*, 37 F.3d 1274, 1275 (8th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), Farmland filed a supplemental bill of costs under Federal Rule of Appellate Procedure 39(e) for court reporter fees incurred in

obtaining a transcript for the appeal. The district court[1] awarded these costs, rejecting Paul's argument that Farmland's request was untimely under Rule 39(d). Paul appeals, and we affirm.

Rule 39(a) allows costs to be taxed against the appellant if the judgment is affirmed. Subdivision (c) allows the court of appeals to fix by local rule the maximum rate for "the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records." Subdivision (d) provides in part, "A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs" filed with the clerk "within 14 days after the entry of judgment." Subdivision (e) states in part, "Costs incurred in the preparation and transmission of the record, [and] the cost of the reporter's transcript, if necessary for the determination of the appeal, . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

We believe the district court correctly joined other courts in finding the phrase "such costs" in subdivision (d) refers to the costs listed in subdivision (c). *See McKelvy v. Metal Container Corp.*, 125 F.R.D. 179, 183 (M.D. Fla. 1989) (Rule 39(d) governs procedure by which costs are requested from court of appeals; reference to "such costs" implies those parts of rule preceding subdivision (d)); *see also McDonald v. McCarthy*, 966 F.2d 112, 114-15 (3d Cir. 1992) (stating in dictum that reading Rule 39 in its entirety reveals time limits in Rule 39(d) apply to costs

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[1] The Honorable Dean Whipple, United States District Judge for The Western District of Missouri.

of briefs, appendices, and copies of records allowable under Rule 39(c), and that Rule 39(d)'s time limit should not be read into Rule 39(e)); *Sudouest Import Sales Corp. v. Union Carbide Corp.*, 102 F.R.D. 264, 264-65 (D.P.R. 1984) (stating in dictum that Rule 39(e) says nothing about time limit). We also believe the district court correctly reasoned that subdivisions (c) and (e) refer to different types of costs that are to be requested in different courts. *See Waterman S.S. Corp. v. Gay Cottons*, 419 F.2d 372, 373 (9th Cir. 1969) (cost of reporter's transcript for appeal is taxable in district court); 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3985.1, at 672-73 (2d ed. 1996) (costs listed in Rule 39(e) are taxable only in the district court and "prevailing party should make a separate application to the district court after the mandate has been received from the court of appeals"). Furthermore, we construe subdivision (e)'s language "costs under this rule" to refer to subdivision (a)'s provisions as to whom costs are allowed.

For these reasons we agree with the district court that the fourteen-day time limit of subdivision (d) does not apply to costs taxed in the district court under subdivision (e), and we see no abuse of discretion in the district court's determination that the timing of Farmland's request was reasonable. Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 97-2984WMKC

Ronald P. Paul,	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and
v.	*	Suggestion for
Farmland Industries, Inc.,	*	Rehearing En Banc
	*	
Appellee.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 8, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit